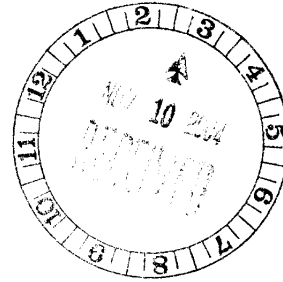


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STEPTOE & JOHNSON ^{LLP}
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November 10, 2004

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Via HAND DELIVERY

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

**RE: Finance Docket No. 34505, East Brookfield & Spencer
Railroad, LLC – Exemption Lease and Operation –
CSX Transportation, Inc.**

Dear Secretary Williams:

Enclosed for filing in the above-captioned docket are the original plus ten copies of a Reply to Petition to Revoke.

I would appreciate it if you would date-stamp the additional copy of the filing provided and return it to the messenger for our files. I appreciate your attention to this matter.

Sincerely,

Betty Jo Christian
Attorney for East Brookfield &
Spencer Railroad, LLC

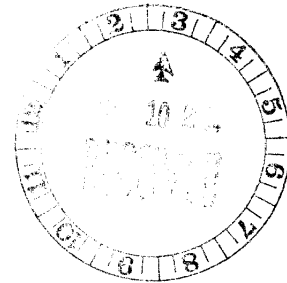
Encls.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34505

EAST BROOKFIELD & SPENCER RAILROAD, LLC
--EXEMPTION LEASE AND OPERATION--
CSX TRANSPORTATION, INC.

REPLY TO PETITION TO REVOKE



ENTERED
Office of Proceedings

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Public Record

Filed on Behalf of East Brookfield & Spencer Railroad, LLC

By:

Betty Jo Christian
Scott M. Mirelson
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036

Date: November 10, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34505

EAST BROOKFIELD & SPENCER RAILROAD, LLC
--EXEMPTION LEASE AND OPERATION--
CSX TRANSPORTATION, INC.

REPLY TO PETITION TO REVOKE

East Brookfield & Spencer Railroad, LLC ("EB&SR") hereby files this Reply to the United Transportation Union's ("UTU") October 21, 2004 Petition to Revoke. UTU has not shown that revoking EB&SR's Notice of Exemption is justified and its Petition must be denied.

I. INTRODUCTION

On May 12, 2004, EB&SR filed a verified Notice of Exemption pursuant to 49 C.F.R. § 1150.31 to allow it to lease and operate approximately 4 miles of track from CSX Transportation, Inc. ("CSX") adjacent to the CSX mainline in East Brookfield and Spencer, Worcester County, Massachusetts. The leased trackage includes approximately 270 feet of lead track running from that adjacent track to the property line of the proposed New England Automotive Gateway Facility ("Facility"). As part of the lease agreement to operate the line, CSX retains rights to operate over the line to serve the Facility and to use the leased track in the event of an operating emergency. EB&SR also certified that its projected aggregate revenues would not exceed the amount that allows it to qualify as a Class III rail carrier and that its projected annual revenues do not exceed five million dollars.

On June 8, 2004, the Board's Office of Proceedings served the Notice of Exemption and published it in the Federal Register.¹ Over four months later, on October 21, 2004, UTU filed a Petition to Revoke ("UTU Petition") EB&SR's Notice of Exemption with the Board. UTU also served a document production request upon EB&SR pursuant to 49 C.F.R. § 1114 and 49 C.F.R. § 1121 along with its Petition to Revoke. In its Petition to Revoke, UTU argues that EB&SR's Notice of Exemption should be revoked for the following 3 reasons, among others. First, UTU asserts that "[t]he transaction, in whole or in part, noticed for exemption does not fall within the noncarrier line acquisition class exemption, promulgated by 49 C.F.R. § 1150.32, et seq." UTU Petition at 2. Next, UTU asserts that "[r]egulation of the transactions, in whole or in part, is necessary to carry out the rail transportation policy of 49 U.S.C. § 10901." *Id.* Third, UTU states that the Notice of Exemption should be revoked because "[t]he Notice contains false or misleading information about the transaction." *Id.* at 3. No specific or particularized cause or concern is raised in support of these assertions. UTU also informed the Board that it has served a discovery request upon EB&SR and will supplement its Petition to Revoke at a later date. See *id.*

II. UTU HAS NOT SATISFIED THE BURDEN OF PROOF REQUIRED TO REVOKE EB&SR'S NOTICE OF EXEMPTION AND ITS PETITION MUST BE DENIED

UTU has not satisfied the burden of proof necessary for the revocation of the Notice of Exemption and its Petition must be denied. "The Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title." 49 U.S.C. § 10502(d). The Board's regulations explicitly provide that "[t]he

¹ *East Brookfield & Spencer R.R., LLC--Lease and Operation Exemption--CSX Transp., Inc.*, STB Finance Docket No. 34505, 69 Fed. Reg. 32094 (June 8, 2004).

person seeking revocation has the burden of showing that the revocation criteria of 49 U.S.C. 10502(d) have been met.” 49 C.F.R. § 1121.4(f). The Board’s decisions have been very clear that “[t]he party seeking revocation has the burden of proof and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and regulation of the transaction is necessary.”²

UTU has not met its burden in this case and has not shown “reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and regulation of the transaction is necessary.”³ It has merely asserted that the EB&SR-CSX transaction does not fall within the noncarrier acquisition class exemption, regulation of the transaction is necessary to carry out the rail transportation policy and EB&SR’s notice contains false or misleading information about the transaction. *See* UTU Petition at 2-3. Such conclusory, unsupported

² *See e.g., MVC Transp., LLC-Acquisition Exemption-P&LE Properties, Inc.*, STB Finance Docket No. 34462, slip op. at 7 (served Oct. 20, 2004) (“MVC”); *see also Meridian Southern Ry., LLC-Acquisition and Operation-Line of Kansas City Southern Ry. Co.*, STB Finance Docket No. 33854, 2000 STB LEXIS 490, at **5-6 (served Aug. 29, 2000) (“But our general policy is that a person seeking to revoke an exemption such as this must present not just generalized concerns, but rather some specific, particularized, and reasonable cause for concern in order for us to revoke an individual use of this class exemption.”); *Minnesota Northern R.R., Inc.-Exemption-Acquisition and Operation of Rail Line and Incidental Trackage Rights from Burlington Northern R.R. Co.*, STB Finance Docket No. 33315, 1997 STB LEXIS 194, at **7-8, 12-13 (served Aug. 14, 1997) (“To warrant rejection of a notice of exemption, a petitioner must demonstrate that the notice contains false or misleading information...To warrant revocation of an exemption, in whole or in part, a petitioner must show that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101. The party seeking to revoke the exemption has the burden of proof, and a petition to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and regulation of the transaction is necessary.”); *Railroad Ventures, Inc. - Acquisition and Operation Exemption - Youngstown & Southern R.R. Co.*, STB Finance Docket No. 33385, 1997 STB LEXIS 151, at *7 (served July 15, 1997) (“The party seeking revocation has the burden of proof and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and regulation of the transaction is necessary.”).

³ *See MVC*, slip op. at 7.

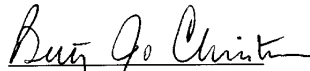
statements are not sufficient to warrant the Board's revoking EB&SR's Notice of Exemption and the Petition must be denied.

UTU has indicated that it may file a supplement to its Petition to Revoke after it receives EB&SR's response to its discovery request. If it does so, EB&SR reserves the right to supplement this Reply pursuant to 49 C.F.R. § 1121.2.

III. CONCLUSION

UTU's Petition to Revoke EB&SR's Notice of Exemption must be denied as UTU has not met its burden of proof. If UTU files a supplement to its Petition, EB&SR reserves the right to file a supplemental Reply.

Respectfully submitted,



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Attorneys for
East Brookfield & Spencer Railroad, LLC

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Reply to Petition to Revoke on November 10, 2004, via first-class mail, postage prepaid, upon the following:

Daniel R. Elliott, III
Associate General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107-4250



Keith Decker